

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 99-0046 ST
SALES AND USE TAX
For Tax Periods: 1995 Through 1997

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Issues

1. Sales and Use Tax-Retail Sale

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-3-2 (d), IC 6-2.5-1-2, IC 6-2.5-4-1, 45 IAC 2.2-5-54 (a), First National Leasing and Financial Corporation v. Indiana Department of State Revenue, 598 N.E.2nd 640, (Ind. Tax 1992).

Taxpayer protests the assessment of gross retail tax on the sale of catalogs.

2. Tax Administration-Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

Taxpayer protests the imposition of the penalty.

Statement of Facts

The taxpayer is an Indiana partnership that produces catalogs for a direct mail order business. After an audit for the years 1995-1997, additional gross retail tax was assessed against the taxpayer. The taxpayer protested this assessment and a hearing was subsequently held. Further information will be provided as necessary.

1. Sales and Use Tax-Retail Sale

Discussion

The taxpayer negotiates with various entities to secure design services, paper, printing, and mailing of the catalogs as directed by its customer, a mail order business. That business provides its customer lists to the taxpayer. The bulk of the catalogs are mailed directly to the direct mail order business' customers. Other catalogs are delivered to the Indiana location of the direct mail order business where they are inserted into packages of goods being sent to customers or sent to potential customers as advertising. Catalogs are also sent to the Indiana location where they are used as samples for management and by employees in various capacities including the order entry area. Catalogs are also sent to offices of companies around the country that are related to the direct mail order business.

The auditor assessed Indiana sales tax on catalogs delivered into Indiana that were used in the offices and ordering areas of the direct mail order business, that were mailed as advertising from the mail order business Indiana location to Indiana residents and that were inserted into the orders delivered from the mail order business Indiana location. The taxpayer protests these assessments.

Indiana imposes a sales tax on retail transactions made within the state. IC 6-2.5-2-1(a). IC 6-2.5-3-2(d). A "retail transaction" is defined at IC 6-2.5-1-2 as including a transaction of a retail merchant that constitutes "selling at retail" as described in IC 6-2.5-4-1. IC 6-2.5-4-1(b),(c) states:

- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) Acquires tangible personal property for the purpose of resale; and
 - (2) Transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) The property is transferred in the same form as when it was acquired;
 - (2) The property is transferred alone or in conjunction with other property or services; or
 - (3) The property is transferred traditionally or otherwise.

The taxpayer contends that its activities do not constitute a retail sale as defined by statute. Rather, the taxpayer contends that its activities are services that are not subject to the gross retail tax. The taxpayer produced a contract between itself and the mail order business dated August 30, 1993 that supports the taxpayer's contention that the taxpayer provided non-taxable services to the mail order business. The contract states at Section 8 as follows:

Service. Except as expressly provided in this Agreement, neither [mail order business] nor [taxpayer] authorizes the transfer, use, consumption, control or right of use of the title or possession, whether actual or constructive, of tangible personal property in any manner or form pursuant to this Agreement. Tangible personal property owned or controlled by [mail order business] or [taxpayer] shall, at all times, remain in the sole control and possession of, respectively, [mail border business] or [taxpayer]. This Agreement provides for the provision of services only, except as expressly provided herein.

While the taxpayer may characterize activities as services, that does not change the fact that the taxpayer actually produces catalogs which it sells to the mail order business. It is established Indiana law that tax consequences are determined by the substance rather than the form of a transaction. First National Leasing and Financial Corporation v. Indiana Department of State Revenue, 598 N.E.2nd 640, (Ind. Tax 1992).

The catalogs are of value to the direct order mail business since they offer the products for sale. The direct mail order business provided the mailing lists for the catalogs. The direct mail order business determined how many catalogs would be delivered to and mailed from out of state drop mail points and how many would be delivered to the Indiana facility. This value of the catalogs to the direct order mail business and control over the product are further indications that the direct mail order business purchased the catalogs in a retail transaction. The substance of this transaction is that a transfer of control actually takes place and the catalogs are in the possession of the direct mail order business after the transfer. Therefore this transaction meets the definition of a retail transaction since tangible personal property is transferred for a consideration.

The remaining issue to be determined is whether or not the transaction is an Indiana transaction subject to the Indiana gross retail tax. Both the seller and buyer of the tangible personal property are Indiana business entities. Those sales that have nexus with Indiana are subject to the Indiana tax. 45 IAC 2.2-5-54 (a). The auditor only assessed sales tax on the sales with clear connections to Indiana. Many of the catalogs are sent from the printers directly to the taxpayer's customers in Indiana. Many of the catalogs are actually located in Indiana at the direct mail corporate headquarters. These catalogs are used in offices by executives and order takers in the phone ordering division. Other catalogs on which the auditor assessed sales tax are those catalogs that are accepted at the direct mail order business at the Indiana location and mailed as advertising to potential Indiana customers. The remainder of the catalogs upon which the auditor assessed sales tax are those catalogs that are accepted at the Indiana location of the direct mail order business and included in packaged orders delivered to customers. Each of the assessed transactions clearly has adequate nexus with Indiana for the Indiana sales tax to apply. None of the assessed transactions qualify for any exemptions from the sales tax.

Finding

Taxpayer's protest is denied.

2. Tax Administration-Penalty

Discussion

Taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

In this instance, Taxpayer failed to follow the instructions of the department in the way it reported its sales tax liability. This breach of its duty to properly report and remit sales taxes constitutes negligence.

Finding

Taxpayer's protest is denied.

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